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ABSTRACT

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COMMUNICATIVE COMPETENCE IN AMERICAN TRIAL COURTROOMS

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COMMUNICATIVE COMPETENCE IN AMERICAN TRIAL COURTROOMS*

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Increasingly in recent years, linguists and sociolinguists have come to accept as a theoretical goal the characterization of communicative competence, defined for example by Gumperz and Hymes as "what a speaker needs to know to communicate effectively in culturally significant settings" (1972:vii) and by Fillmore as "knowledge of appropriate situated language use" (1973:276). This knowledge may be seen as describable by a set of rules which are sensitive to social context and which constrain language behavior.

The trial courtroom is a class of settings of considerable cultural significance in America. My purpose in this paper is to discuss some of the types of rules required in this class of settings and to make some general comments on the nature of communicative competence.

The significance of trial courtrooms in America is due in large part to the fact that they are the arenas for political contests in which the stakes are high. For some

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of the participants, lack of success involves loss of property, reputation, or liberty. For others, success will pave the way for entry into higher political arenas. The outcome of court trials affects, more or less directly, the lives of all Americans. The frequency of the court trial as a literary motif in books, both fiction and non-fiction, plays, movies, and television series attests the extent to which this significance is generally perceived.

Not only are court trials culturally significant, but they seem particularly indicated as a research focus for the language sciences. All societies have available to them a set of institutionalized procedures for the settlement of disputes. Viewed from a cross-cultural perspective, one important dimension of variation is the extent to which these procedures make use of physical as opposed to verbal means. Where dispute-settlement procedures rely heavily on physical means, trial by combat for example, the advantage lies with those having the greater physical abilities. Similarly, where these procedures rely on verbal means, as in American trial courtrooms, the advantage would appear to lie with those having the greater verbal abilities.

However, while there is a tradition of interest in courtroom activities by scholars in several social science disciplines, linguists have not to my knowledge been among them. Further, coverage of the linguistic aspects of courtroom activities by the other social science disciplines and

by legal scholars has been strikingly uneven.

The most elaborated and well-personned conceptual framework available for communicative competence is the 'ethnography of communication' (see Gumperz and Hymes 1972, Bauman and Sherzer 1974), most closely associated with the name of Dell Hymes. In the following discussion, I will make use of this framework.

The current research direction of the ethnography of communication is toward the formulation of descriptive theories of communication as part of particular cultural systems. To this end, Hymes has provided a heuristic list of sixteen 'components of speaking' (1972), the boundaries and interelationships of which are as yet only dimly understood. These are

1. Message form
2. Message content
3. Setting
4. Scene
5. Speaker/sender
6. Addressor
7. Hearer/receiver/audience
8. Addressee
9. Purposes-outcomes
10. Purposes-goals
11. Key
12. Channel

13. Forms of speech

14. Norms of interaction

15. Norms of interpretation

16. Genre

It is apparent that language behavior in courtroom interaction is constrained by numerous and various rules of speaking. Rules referring to most of Hymes' components are readily identifiable. Some of these rules are discussed informally below. Note that these rules vary along a number of dimensions: the specificity with which behavior is constrained, the force and source of sanctions involved, the provenience of the rule, and the range of situations in which the rule is applicable.

The social unit of investigation for the ethnography of speaking is the speech community. A priori, and in accordance with established practice, the present study has a more limited focus. That is, I will be concerned here with a class of <u>settings</u> (3) (American trial courtrooms), and more specifically with a class of <u>scenes</u> (4) (trials) which appropriately occur in those settings. (In fact, my personal observations are limited to one North Carolina superior court.) Other <u>scenes</u> enacted in courtrooms include various other court business transacted while court is "in session". When court is not in session, the courtroom is just another room in a public building.

The boundaries of "court in session" are marked verbally

in part by the bailiff's call of "All stand/rise", and non-verbally in part by the entrance and exit of the presiding judge. When court is in session, a distinction is made between language behavior which is part of the scene and language behavior extraneous to the scene. Extraneous language behavior, such as conversation between spectators or when messages are brought in to the judge or another participant, are constrained as to channel (12) in that it may be written or, if oral, in a low tone or whisper. Henceforth, I will be concerned only with language behavior that is clearly part of the scene.

The participant roles in trials are clearly defined, and for each there is a set of rules of speaking. These roles include, in addition to the parties to the case and their counsel, judge, bailiff, clerk, marshal, stenographer, juror, witness, spectator.

Here are some of the rules specific to some of the roles:

1. The stenographer (court reporter) is in most cases the most verbal in terms of production of the participants, yet rarely speaks and most of his messages never reach a receiver. Appropriate speech for this role is restricted as follows: he may, in a low voice, comment to the judge on the audibility of the speech of other participants; and he will, on demand of the judge, repeat portions of the speech of other participants. On the other hand, he records in written form

a large, but carefully limited, portion of the language behavior of the other participants. In the case of an appeal, this transcript is the official record of the trial, but otherwise is rarely read by anyone.

The stenographer's role as hearer (7) is firmly established, and the speech of others must be audible to him. However, his role as addressee (8) is restricted. Cf. "Any directions or instructions to the court reporter are to be made in open court by the presiding judge only, and not by an attorney" (General Rules of Practice for the Superior and District Courts (of North Carolina) #12).

2. The speech of the bailiff is restricted in general to a limited stock of routines, that is, speech acts which are completely specified by rule with regard to both message form (1) and message content (2), as "All stand/rise", or "Oyes, oyes, oyes; John Wesley Doe, John Wesley Doe, John Wesley Doe; Come into court this day as you are bound to do so or your forfeiture will be recorded." In this latter example, the four participant components (5-8) must be distinguished: the 'court' is the addressor (6), the bailiff is the speaker (5), those present in the courtroom, i.e., the public, are the hearers (7), and the absent Mr. Doe is the addressee (8).

3. Spectators (bystanders) are allotted no speaking roles as part of the scene, and are addressed rarely: if they violate some rule of the court, for example by speaking loudly,

or when the bailiff says "All stand". Furthermore, the role is an optional one since there need be no spectators. However, the role of the spectator as a hearer (7) is considered a very important one. The Constitution of the United States of America guarantees the right to a public trial, and the improper exclusion of spectators is a serious error on the part of a judge.

A rule of speaking concerning lawyers is the prohibition of "leading questions". A leading question is one that suggests an appropriate response, or, more technically,

> questions which so suggest to a witness the specific tenor of the reply as desired by counsel that such a reply is likely to be given irrespective of an actual memory or questions which instruct the witness how to answer on material points or put words into his mouth to be echoed back are leading (Conrad 1956:340).

Leading questions are not permitted on direct examination; that is, when a lawyer is eliciting testimony from a witness that his side has called, except

> when the matter sought is merely preliminary to matters in dispute, to refresh the memory of a witness, ...on examination of hostile or adverse witnesses, on examination of children of tender years, persons who are not well versed in the English language, persons of sluggish mental equipment, aged and senile persons, timid persons, expert witnesses, and generally where the interests of justice so require (Conrad 1956:341).

Participants are thus required, in certain circumstances, to make a judgment as to the extent to which a question suggests a response.

A rule of speaking concerning witnesses is the hearsay rule. In general, the "law" does not admit "hearsay" evidence,

which is "evidence of a statement, which is made other than by a witness while testifying at the hearing, offered to prove the truth of the matter stated" (Katsaris 1975:179). The "statement" may be oral, written, or non-verbal.

This rule requires the witness in making informative statements to distinguish between what he knows from direct observation and what he knows as the result of communicative acts of others. There are a number of exceptions to the hearsay rule which will serve as an illustration of the degree of sophistication to which courtroom rules of speaking have been refined. Some of these exceptions are listed here.

Dying declaration. A statement by a person who has since died is admissible in a murder trial if it was made voluntarily by the deceased while he knew of his impending death and had lost all hope of recovery, if it concerns the circumstances that immediately led to his death, and if he was the murder victim (Katsaris 1975:186-187).

Pedigree. "Theoretically, a man does not know his own father or birthday except by hearsay evidence because he was not present at the moment of conception and is incapable of remembering the day he was born" (Katsaris 1975:187-188). However, the pedigree exception allows witnesses to testify as to their birthday, age, parentage, and other such matters.

Ancient documents. "A record or document found to be at least thirty years of age and which is proven to come from proper custody and is itself free from indication of fraud

District Court is English" (Ginsberg 1975:11).

"When witnesses testify in a foreign language, the testimony must be translated into English" (Conrad 1956: 331). The fact that the interpreter's translations of witness' statements may be allowed as evidence requires another exception to the hearsay rule.

Thus, the form of speech (13) used in the courts is 'English'. No notice, judicial or otherwise, is taken of varieties of English.

Similarly, social scientists concerned with courtroom activities consider language variation, when they consider it at all, as a variable to be controlled, rather than as a variable to be investigated in its own right. Cf. Walker et al. 1972. (O'Barr et al. 1974:1)

However, it is apparent that participants in courtroom interaction use different varieties of English. Further, given the importance of verbal abilities in American trial courtrooms, the fact that part of this ability involves the command of and appropriate choice from a verbal repertoire consisting of a range of varieties, and that choice of variety has been shown, by Labov and Lambert for example, to significantly influence the subjective reactions of listeners, one would expect this variation to be a significant aspect of courtroom interaction.

Thusfar, I have indicated some types of rules of speaking operative in courtroom trials. I will now briefly

or invalidity is admissible in evidence, if otherwise relevant" (Conrad 1956:231).

The Hymesian component of particular interest to many sociolinguists is forms of speech (13) which refers to "the verbal resources of a community" in terms of language varieties (dialects, languages, styles, registers, or what have you) (Hymes 1972:63). Thusfar, however, this component has not been mentioned.

The reason for this is that I have been discussing normative rules of the court, and forms of speech (language varieties) have only a small place in these rules. They are covered by the doctrine of 'judicial notice'. "Judicial notice is the cognizance of certain facts which judges, jurors, and administrative bodies may properly take and act upon without proof because they already know them" (Conrad 1956:184). "The courts take judicial notice of the meaning of words, phrases, and abbreviations in the English language and may always refer to standard authorities to refresh their memories and understanding of such meaning" (Conrad 1956:198-199). "As a general proposition, the courts will not take judicial notice of foreign language words" (Conrad 1956:199).

Or, as Judge Julius J. Hoffman stated after Allen Ginsberg recited the Hare Krishna Mantra during the Chicago 7 trial, "I don't understand it. I don't understand it because it was (pause) the language of the United States

review some more linguistic studies done recently which bear on language use in courtrooms.

1. Loftus has conducted some interesting experiments relevant to the notion 'leadingness of questions'. In one experiment, Loftus and Palmer found that subjects were less likely to answer "No" to the question "Did you see the broken headlight?" than to the the question "Did you see a broken headlight?", whether or not they had in fact seen a broken headlight. Similarly, subjects typically mentioned higher numbers in answer to the question "About how fast were the cars going when they smashed into each other?" than to the same question with "hit" instead of "smash". Further evidence indicates that the form of questions can permanently alter a person's memory of an event (Loftus and Palmer 1974).

2. O'Barr and associates are engaged in research on the questions "What effects does language variation have on the outcome of trials?" and "To what extent is control of these variables available to participants in courtroom activities?" No solid results are available as yet, but in a pilot study comparing two types of 'court talk', formal standard English and 'hypercorrect' standard English, subjects rated the formal speaker significantly more competent, convincing, qualified, and intelligent. Also, greater financial awards were made against the witness who spoke in the hypercorrect fashion (O'Barr et al. 1975).

3. Decamp (1974) has briefly studied the extent to which

inferences may reasonably be drawn regarding the beliefs of a speaker from speaker's report of the beliefs of others. For example, could Nixon's statement, "Dean recognized it as blackmail", be evidence than Nixon knew of a blackmail attempt?

4. Charrow and Charrow have experimented with jurors' comprehension of instructions from the judge. Preliminary results reported recently indicate that in some instances jurors are more likely to reach a correct verdict without instruction than with (Charrow and Charrow 1975).

5. Finally, Danet has looked at verbal strategies employed by Watergate witnesses. One of these is 'evasion', answering a different question than the one asked. For example,

> "Weiker: So your disapproval was on the basis you were surprised?
> Erlichmann: I certainly was."
>
> (Offir 1974:40)

General comments on communicative competence:

For the most part, I have been speaking of 'normative' rules, in Bailey's sense of rules which establish limits to permissible behavior (1969), of courtroom activity which are furthermore largely explicit. This is because these rules are most readily established.

There is another set of less explicit normative rules which operate on the first set. For example, we have seen that there is a rule against leading questions in some circumstances. However, lawyers may and often do ask leading

questions anyway. The opposing lawyer may then make use of a repair mechanism, the objection, and call on the judge to decide on the propriety of the question. If there is no objection, the question and answer become part of the evidence. Even if there is an objection and it is sustained by the judge, the question may have accomplished its purpose.

These rules shade into what Bailey (1969) has called 'pragmatic' rules, rules not for permissible behavior but for winning behavior.

Another aspect of communicative competence is that certain participants, jurors and many defendants and witnesses, are appropriately ignorant of all of the rules discussed above. In fact, a potential juror will generally be disqualified if he has had any legal training. The competence that the non-professional participant brings to the courtroom is just the general shared competence of the community member which says, for example, "courtroom trials are very formal situations", and so forth.

All of this strongly suggests that studies of communicative competence in courtroom settings should distinguish between what participants can do, what they may do, what they should do, and what they actually do.

Finally, a comment on the reasons that linguists have avoided the study of language behavior in legal contexts: In the first place, there is the familiar combination of intellectual traditions and research priorities which have

worked to decontextualize linguistics in general. More specifically, I think there are reasons due to the highly structured nature of language behavior in these contexts. 1. Language behavior in the courts is felt to be specialized, artificial, and generally unnatural. 2. So much is already known about language behavior in these situations, by certain non-linguists, that the amount of catching up that one would be required to do is intimidating.

The former reason is unconvincing both because of the practical significance of the situations and because language use is always constrained by situational factors. A situation in which these constraints are particularly explicit and restricted seems in fact to be especially valuable for understanding the nature of such constraints in general, and therefore of language.

The latter reason I am very much in sympathy with.

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